

1 David S. Blau (Bar No. 166825)  
2 David M. Morrow (Bar No. 175776)  
3 Law Offices of David S. Blau, P.C.  
4 6080 Center Drive, Suite 210  
5 Los Angeles, California 90045  
6 (310) 410-1900 phone  
7 (310) 410-1901 fax  
david@blaulaw.net

8 Attorneys for Defendant  
9 AMERICAN SAFETY INDEMNITY COMPANY

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**UNITED STATES DISTRICT COURT**  
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

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ACCEPTANCE INSURANCE  
COMPANY,

vs.

Plaintiff,

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AMERICAN SAFETY RISK  
RETENTION GROUP, INC., and  
AMERICAN SAFETY INDEMNITY  
COMPANY,

Defendants.

Case No. CV08-01577 GPS (AGRx)

DEFENDANT AMERICAN  
SAFETY INDEMNITY  
COMPANY'S NOTICE OF  
MOTION AND MOTION TO  
DISMISS; MEMORANDUM OF  
POINTS AND AUTHORITIES  
[FED. R. CIV. P. 12(b)(6)]

[Filed and Served Concurrently With  
Request for Judicial Notice]

Date: April 14, 2008  
Time: 1:30 p.m.  
Place: Courtroom 7  
Judge: Hon. George P. Schiavelli

ORAL ARGUMENT REQUESTED

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on April 14, 2008, at 1:30 p.m., or as soon thereafter as counsel may be heard in Courtroom 7 of the above-entitled court, located at 312 North Spring Street, Los Angeles, California 90012, Defendant AMERICAN SAFETY INDEMNITY COMPANY will and hereby does move this Court to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6). This motion is based on Plaintiff's First Amended Complaint (filed in

1 state court prior to removal), which fails to state a claim upon which relief can  
2 be granted, as the causes of action for contribution stated therein against  
3 Defendant AMERICAN SAFETY INDEMNITY COMPANY are barred by the  
4 applicable two (2) year statute of limitations provided by California Code of  
5 Civil Procedure § 339.

6 Plaintiff's causes of action for contribution against AMERICAN SAFETY  
7 INDEMNITY COMPANY arose on or before August 16, 2004, and yet Plaintiff  
8 failed to amend the complaint to state claims against AMERICAN SAFETY  
9 INDEMNITY COMPANY until February 7, 2008. Thus, the causes of action  
10 for contribution stated in the First Amended Complaint are time-barred as  
11 against Defendant AMERICAN SAFETY INDEMNITY COMPANY.

12 Further, because there is no written instrument between the Plaintiff and  
13 ASIC, the cause of action for declaratory relief cannot stand, and should  
14 similarly be dismissed.

15 THIS MOTION IS MADE FOLLOWING THE CONFERENCE OF  
16 COUNSEL PURSUANT TO LOCAL RULE 7-3, WHICH TOOK PLACE VIA  
17 TELEPHONE CONFERENCE ON MARCH 12, 2008.

18 This motion will be based on this notice, the attached memorandum of  
19 points and authorities, the Request for Judicial Notice, the records and pleadings  
20 on file in this action, and upon such further evidence, either oral or documentary,  
21 as this Court will consider at the hearing on this Motion. Oral argument is  
22 requested.

23 DATED: March 17, 2008

Respectfully submitted,

24 Law Offices of David S. Blau

25 By:



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28  
David S. Blau  
David M. Morrow  
Attorney for Defendant  
American Safety Indemnity Company

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   Defendant AMERICAN SAFETY INDEMNITY COMPANY (“ASIC”)  
3 respectfully submits the following Memorandum of Points and Authorities in  
4 Support of its Motion to Dismiss pursuant to Federal Rule of Civil Procedure  
5 (“Fed. R. Civ. P.”) 12(b)(6).

6                   **I. INTRODUCTION**

7                   This action was removed by ASIC following Plaintiff’s filing of a First  
8 Amended Complaint which named ASIC as a defendant for the first time in the  
9 case.

10                  This is a contribution action between liability insurers, wherein Plaintiff  
11 claims that both Defendant ASIC, and Defendant AMERICAN SAFETY RISK  
12 RETENTION GROUP, INC. (“ASRRG”), must reimburse Plaintiff for sums  
13 incurred in the defense and indemnity of mutual insured, Bay Area Construction  
14 Framers, Inc. (“Bay Area”), in connection with an underlying construction  
15 defect action styled Portola Meadows Townhomes Assoc. v. Davidon Homes, et  
16 al., Superior Court of the State of California for the County of Alameda, Case  
17 No. V-020385-4 (the “Portola action”). Acceptance, ASRRG, and ASIC each  
18 issued separate liability policies to Bay Area.

19                  Plaintiff’s causes of action for contribution against ASIC are time-barred by  
20 the two (2) year statute of limitations set forth in California Code of Civil  
21 Procedure § 339. Plaintiff’s contribution claims arose, at the latest, on or before  
22 August 16, 2004, when Plaintiff paid to settle the underlying Portola action.  
23 Plaintiff failed to name ASIC as a defendant in this action until February 7,  
24 2008, which is nearly three (3) and a half years later. In order to assert a claim  
25 for contribution against ASIC, who was just added to the suit on February 7,  
26 2008, Acceptance would have to allege and show a payment, concurrently owed  
27 by ASIC, made after February 7, 2006. As the underlying Portola action was

1 settled in August 2004, the statute of limitations applies.

2 Further, as explained herein, Plaintiff cannot rely on the “relation back”  
 3 doctrine to revive its time-barred claims, because it cannot establish “genuine  
 4 ignorance” of ASIC’s identity at the time it initiated this action. Acceptance  
 5 investigated and discovered ASIC’s identity before filing this case, but simply  
 6 failed to sue ASIC in a timely manner, which is clearly distinct from being truly  
 7 ignorant of ASIC’s identity.

8 For these reasons, the First Amended Complaint fails to state causes of  
 9 action against ASIC upon which relief can be granted. The two (2) year statute  
 10 of limitations in Code of Civil Procedure § 339 poses an absolute bar to recovery  
 11 on each contribution claim.

12 In addition, the Plaintiff’s cause of action for declaratory relief cannot stand,  
 13 as there is no written agreement or other contractual relationship between the  
 14 Plaintiff and ASIC.

15 Accordingly, Plaintiff’s complaint should be dismissed as to ASIC.

## 16 II. **FACTUAL BACKGROUND**

### 17 A. **Acceptance’s Defense and Indemnity of Bay Area in Connection** **with the Portola action**

18 On April 10, 2001, the Portola action was filed against developer Davidon  
 19 Homes, alleging construction defects at the “Portola Meadows” development,  
 20 and on June 11, 2001, Davidon Homes filed a cross-complaint for indemnity  
 21 against Bay Area. (First Amended Complaint, paragraphs 10 and 11.)

22 Acceptance agreed to defend Bay Area in connection with the Portola  
 23 action, and in November 2001, retained Acceptance’s counsel in the present  
 24 case, Koletsky, Mancini, Feldman & Morrow (“Koletsky Mancini”) to defend  
 25 Bay Area. (First Amended Complaint, paragraph 14.) After defending Bay  
 26 Area in connection with the Portola action, on August 16, 2004, Acceptance  
 27 paid \$510,000.00 to settle the Portola action on behalf of Bay Area. (ASIC’s  
 28

1 Request for Judicial Notice filed herewith ("RJN"), Exh. "A."

2       **B. Acceptance's First Contribution Action Arising Out of the**  
       **Portola Action, In Which the Identity of Bay Area's Other**  
       **Insurers Was Litigated**

3  
 4 On June 29, 2004, in Bay Area's name, the Koletsky Mancini firm first  
 5 brought suit seeking recovery of the amounts Acceptance had incurred  
 6 defending and indemnifying Bay Area in connection with the Portola action.  
 7 (RJN, Exh. "B.")

8       However, the Koletsky Mancini firm named as defendant a non-existent  
 9 entity, "American Safety Insurance Company." (RJN, Exh. "B," Page 1.) The  
 10 Koletsky Mancini firm then served the complaint upon an existent, but  
 11 unrelated, entity, "American Safety Casualty Insurance Company." (RJN, Exh.  
 12 "C.")

13       In response, American Safety Casualty Insurance Company specially  
 14 appeared and moved to quash the service of summons based upon the fact that  
 15 American Safety Casualty Insurance Company had not been named in the  
 16 complaint. (RJN, Exh. "D.") In opposition to the motion, the Koletsky Mancini  
 17 firm argued that "American Safety Casualty Insurance Company," the correct  
 18 entity that insured Bay Area, would not be prejudiced in any event because it  
 19 already had notice of the lawsuit through its defense counsel, and that American  
 20 Safety Casualty Insurance Company's counsel was "withholding" information in  
 21 an effort to deceive the Koletsky Mancini firm. (RJN, Exh. "E," pages 3-4.)

22       On September 9, 2004, the state court granted American Safety Casualty  
 23 Insurance Company's motion to quash service because the Koletsky Mancini  
 24 firm had named an entirely different entity in its complaint. (RJN, Exh. "F.")  
 25 Notably, at the hearing on the Motion to Quash, the Court specifically  
 26 admonished Acceptance's then and current counsel, Mr. Perry Rhoads of the  
 27 Koletsky Mancini firm, to identify the proper insurer: "Mr. Rhoads, . . .you're  
 28 going to have to do your homework and sue the right defendant." (RJN, Exh.

1       “G.”)

2           Thereafter, the Koletsky Mancini firm filed an “Amendment to Complaint”  
 3 correctly substituting one of Bay Area’s insurers, ASRRG, into the case as a  
 4 defendant (RJN, Exh. “H”), and located and served ASRRG. (RJN, Exh. “I.”)  
 5 However, the case was later dismissed. (RJN, Exh. “J.”)

6           **C. Plaintiff Acceptance Obtains the ASIC and ASRRG Policies, and**  
 7           **Commences This Second Contribution Action In State Court**  
 8           **Against ASRRG Only**

9           On May 22, 2006, following dismissal of the first contribution action,  
 10          Acceptance’s counsel (the Koletsky Mancini firm) obtained both the ASRRG  
 11          and ASIC policies from Bay Area’s insurance broker, and filed this case in state  
 12          court again seeking contribution arising out of the Portola action. Both the  
 13          ASRRG and ASIC policies are, importantly, attached to the complaint as  
 14          Exhibits “A” and “B,” respectively. (RJN, Exh. “K” - Exhibits “A” and “B”  
 15          thereto.) However, despite the admonition of the court in the previously  
 16          dismissed action, despite having obtained the ASIC policy, and despite the fact  
 17          that the identifying information for ASIC appears on the top of the first page of  
 18          the ASIC policy, the complaint named only ASRRG. (RJN, Exh. “K,” page 1.)

19           Despite having attached ASIC’s policy to the complaint filed nearly two  
 20          years earlier, on February 7, 2008, Acceptance filed a First Amended Complaint  
 21          naming ASIC as a defendant for the first time. (RJN, Exh. “L.”)

22           **III. ARGUMENT**

23           **A. The First Amended Complaint Is Time-barred by the Failure to**  
 24           **Commence Litigation Against ASIC Within the Two-Year Statute**  
 25           **of Limitations in California Code of Civil Procedure § 339**

26           Plaintiff’s contribution claims against ASIC are time-barred because  
 27          plaintiff did not sue ASIC within two (2) years of August 16, 2004, when, at the  
 28          latest, Plaintiff’s alleged contribution claims accrued.

29           A cause of action for equitable contribution must be filed within two (2)

1 years pursuant to the statute of limitations contained in Code of Civil Procedure  
 2 § 339. See also Century Indemnity v. Superior Court, 50 Cal.App.4th 1115  
 3 (1996) (2-year statute applies to equitable contribution claims).

4 An equitable contribution claim for indemnity accrues, and the two (2) year  
 5 statute begins running, when the settlement in connection with which the  
 6 plaintiff seeks contribution, is paid. Preferred Risk Mutual Ins. Co. v. Reiswig,  
 7 21 Cal.4th 208, 213 (1999). Likewise, the statute on a claim against an insurer  
 8 for breach of an alleged duty to defend begins running when the duty to defend  
 9 is terminated by the conclusion of the underlying litigation: “Although the  
 10 statutory period commences upon the refusal to defend, it is equitably tolled  
 11 until the underlying action is terminated[.]” Lambert v. Commonwealth Land  
 12 Title Ins., 53 Cal.3d 1072, 1077 (1991), citing Israelsky v. Title Insurance Co. of  
 13 Minnesota, 212 Cal.App.3d 614, 616 (1989).

14 In this case, documents filed by plaintiff in prior actions demonstrate that  
 15 Acceptance paid \$510,000.00 to settle the Portola action on behalf of Bay Area  
 16 on August 16, 2004. (RJN, Exh. “A.”) Therefore, both the underlying action,  
 17 and any duty to defend Bay Area in connection with that case, were terminated  
 18 with Acceptance’s indemnity payment on August 16, 2004, and at the latest, the  
 19 two (2) year statute commenced running at that time.<sup>1</sup> Accordingly, to comply  
 20 with the two (2) year limitations period of Code of Civil Procedure § 339,  
 21 Acceptance would have had to sue ASIC for contribution on or before August  
 22 16, 2006 at the latest.

23 However, Acceptance did not file its First Amended Complaint naming  
 24 ASIC as a defendant until February 7, 2008, which is three (3) and a half years  
 25 after August 16, 2004. (See First Amended Complaint, filed February 7, 2008.)  
 26 Accordingly, the causes of action against ASIC for contribution are time-barred

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27       <sup>1</sup> The court in the Portola action issued its Order approving the settlement as to Bay Area  
 28 on August 26, 2004. (RJN, Exh. “M.”)

1 by the two (2) year limitations period set forth in Code of Civil Procedure § 339.

2       **B. The Limitations Period Is Not Revived, and the Amended**  
 3       **Complaint Does Not “Relate Back,” Because Plaintiff Was Not**  
 4       **“Genuinely Ignorant” of ASIC’s Identity**

5           ASIC anticipates that in an attempt to rescue its untimely causes of action  
 6 against ASIC, Acceptance’s counsel will claim that it was “ignorant” of ASIC’s  
 7 identity when it initiated this action in state court on May 22, 2006. Acceptance  
 8 is thus likely to posit that the causes of action against ASIC “relate back” to May  
 9 22, 2006, pursuant to California Code of Civil Procedure § 474.

10          In order to take advantage of California Code of Civil Procedure § 474, and  
 11 “relate back” an otherwise time-barred claim to the date a lawsuit is filed, a  
 12 plaintiff must be “genuinely ignorant” of a defendant’s identity when the  
 13 complaint was filed. Kerr-McGee Chemical Corp. v. Superior Court, 160  
 14 Cal.App.3d 594, 597 (1984). It is not enough simply for a plaintiff to argue, in  
 15 retrospect, that they did not know a defendant’s identity, as the plaintiff’s  
 16 ignorance “must be real and not feigned” in order to revive a time-barred claim.  
Snoke v. Bolen, 235 Cal.App.3d 1427, 1432 (1991).

17          Neither Acceptance (itself an insurance company) nor its counsel were  
 18 “genuinely ignorant” of ASIC’s identity when this action was filed on May 22,  
 19 2006, because: (a) Acceptance had previously litigated the identity of Bay Area’s  
 20 insurers before commencing this action, and (b) Acceptance had researched and  
 21 possessed the ASIC policy before filing the complaint in this case.

22          In the prior contribution action, Acceptance’s current counsel specifically  
 23 litigated the correct identity of Bay Area’s insurers, as they named a non-existent  
 24 defendant, served another incorrect entity, had service quashed, and were  
 25 admonished by the Court to “do your homework and sue the right defendant.”  
 26 (RJN, Exhs. “B,” “C,” “F,” and “G.”) Ultimately, Acceptance’s counsel  
 27 correctly identified one of Bay Area’s insurers (ASRRG) as a defendant. (RJN,

1 Exh. "H.")

2 Following the court's admonition, *and prior to filing the complaint in this*  
 3 *matter*, Acceptance's current counsel contacted the insurance broker, obtained  
 4 both the ASRRG and ASIC policies, and correctly attached them to the  
 5 Complaint in this case as Exhibits "A" and "B," respectively. (RJN, Exh. "K.")

6 The ASIC policy which Acceptance's counsel attached to the Complaint  
 7 identifies ASIC at the top corner of the first page as "AMERICAN SAFETY  
 8 INDEMNITY COMPANY," and the last twenty-eight (28) pages of the policy  
 9 are each clearly labeled "American Safety Indemnity Company." (See ASIC  
 10 policy, attached as Exhibit "B" to the Complaint - RJN, Exh. "K.")

11 Having previously litigated the issue, researched and identified the ASIC  
 12 policy, and attached it to the complaint filed on May 22, 2006, Acceptance was  
 13 not "genuinely ignorant" of ASIC's relevance and identity. Rather, it appears  
 14 that Acceptance's counsel simply failed or forgot to name ASIC as a defendant.

15 **C. In Addition, the Amended Complaint Does Not "Relate Back"**  
 16 **Because American Safety Indemnity Company Will Be**  
 17 **Prejudiced By its Last-Minute Inclusion in this Long-Standing**  
**Action**

18 Use of the "relation back" procedure is likewise precluded if: (a) plaintiff  
 19 was dilatory in naming the defendant; and (b) defendant is prejudiced by the  
 20 delay. Winding Creek v. McGlashan, 44 Cal.App.4th 933, 942-43 (1996).

21 For the reasons discussed above, there is no question that Plaintiff was  
 22 dilatory in naming ASIC as a defendant for the first time on February 7, 2008.  
 23 As a further example of its dilatory conduct, the complaint was amended to  
 24 name ASIC only after twenty-one (21) months of Acceptance and ASRRG  
 25 incurring costs and actively litigating the contribution claims, and only after the  
 26 deadlines for discovery, expert designations, and filing of summary judgment  
 27 motions had all expired.

28 For these same reasons, ASIC will be severely prejudiced by its belated

1 inclusion in this litigation, as it has been deprived of the ability to develop and  
 2 present any defenses.

3 ASIC anticipates that Acceptance will claim that, despite missing twenty-  
 4 one (21) months of active litigation which preceded the First Amended  
 5 Complaint, ASIC is not prejudiced by its belated inclusion in this matter because  
 6 ASIC had notice of the lawsuit, and has been “participating,” through ASRRG’s  
 7 defense counsel. However, this argument ignores the fact that ASIC and  
 8 ASRRG are completely separate entities. These are also the same unsuccessful  
 9 arguments previously asserted by the Koletsky Mancini firm in Acceptance’s  
 10 prior contribution suit, wherein the Koletsky Mancini also failed to name the  
 11 correct defendant. (See RJD, Exh. “E,” pages 3-4.) These arguments were  
 12 previously rejected by the state court in the prior contribution suit, and should  
 13 likewise be rejected, if asserted, in this case. (See RJD, Exh. “F.”)

14       **D. There Is No Written Contract Between the Parties, as Required**  
 15       **to Support a Cause of Action for Declaratory Relief**

16 Plaintiff’s third cause of action for Declaratory Relief is necessarily  
 17 premised upon the existence of a written instrument between Plaintiff and ASIC.  
 18 Declaratory relief requires the existence of an actual controversy relating to  
 19 rights and duties “of the respective parties under a written instrument.”  
 20 Wellenkamp v. Bank of America, 21 Cal.3d 943, 947 (1978). See also  
 21 California Code of Civil Procedure § 1060 (The right to declaratory relief is  
 22 available to: “Any person interested . . . under a contract.”).

23       However, contribution suits between insurers are based in equity, not  
 24 contract. See Fireman’s Fund Ins. Co. v. Maryland Casualty Co., 65  
 25 Cal.App.4th 1279, 1295 (1998) (The “right of equitable contribution...is not a  
 26 matter of contract, but flows from equitable principles. . .”).

27       Quite simply, because there is no written contract or other contractual  
 28 relationship between Plaintiff and ASIC, and the only rights asserted between

1 insurance carriers are necessarily premised in equity, the cause of action for  
2 declaratory relief cannot stand.

3 **IV. CONCLUSION**

4 For the reasons stated above, Plaintiff's contribution claims against ASIC  
5 arose, at the latest, on or before August 14, 2004, and are time-barred. Based  
6 upon the allegations in the recently-filed First Amended Complaint, and  
7 Plaintiff's judicial admissions in prior actions, the contribution causes of action  
8 cannot be salvaged by amendment. Further, there is no contractual basis upon  
9 which to premise a cause of action for declaratory relief.

10 Accordingly, ASIC respectfully requests that this motion be granted, and the  
11 First Amended Complaint dismissed as to ASIC, without leave to amend.

12 Respectfully submitted,

13 DATED: March 17, 2008

14  
15 Law Offices of David S. Blau  
16  
17 By:   
18 David S. Blau  
19 David M. Morrow  
20 Attorney for Defendant  
21 American Safety Indemnity Company  
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**PROOF OF SERVICE**

*Acceptance Insurance Co. v. American Safety Risk Retention Group, Inc., et al.*

United States District Court Case No.

**STATE OF CALIFORNIA**

## COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6080 Center Drive, Suite 210, Los Angeles, California 90045.

On March 17, 2008, I served the foregoing documents described as **DEFENDANT AMERICAN SAFETY INDEMNITY COMPANY'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES [FED. R. CIV. P. 12(b)(6)]** on the interested parties in this action by placing a true copy thereof enclosed in the sealed envelopes addressed as follows:

**SEE ATTACHED SERVICE LIST**

- BY MAIL: I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.
- BY PERSONAL DELIVERY: I delivered such envelope by hand to the offices of the addressee.
- VIA FACSIMILE: I caused all of the pages of the above entitled document to be sent to the recipients noted above via electronic transfer (FAX) at the respective facsimile number(s) indicated above. This document was transmitted by facsimile and transmission reported complete without error.
- FEDERAL: I certify or declare that I am employed in the office of a member of the bar of this court at whose discretion the service was made.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postal meter date is more than 1 day after date of deposit for mailing in affidavit.

1 Executed on March 17, 2008 at Los Angeles, California.

2 I declare under penalty of perjury under the laws of the State of California that  
3 the above is true and correct.

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Lea Powell

## SERVICE LIST

*Acceptance Insurance Co. v. American Safety Risk Retention Group, Inc., et al.*

United States District Court Case No.

Raymond C. Dion  
Perry E. Rhoads  
Koletsky, Mancini, Feldman & Morrow  
3460 Wilshire Boulevard, 8th Floor  
Los Angeles, CA 90010  
Telephone: (213)427-2350  
Facsimile: (213)427-2366

Attorneys for Plaintiff,  
ACCEPTANCE INSURANCE COMPANY

Michael Larin  
Dana Alden Fox  
Matthew Harrison  
Lynberg & Watkins  
888 South Figueroa Street, 16th Floor  
Los Angeles, CA 90017-2763  
Telephone: (213)624-8700  
Facsimile: (213)892-2763

Attnorneys for Defendant,  
AMERICAN SAFETY RISK RETENTION GROUP, INC.